NCLBA UPDATE: May 31, 2002

MEMORANDUM

TO: Superintendents and Principals

FROM: William J. Reedy, General Counsel

DATED: May 31, 2002

RE: Miscellaneous Provisions of the *No Child Left Behind Act* (NCLBA)

Much of the information you have heard or will be hearing about the *No Child Left Behind Act* (hereafter NCLBA) involves the assessment and accountability features of Title I; the personnel qualification sections involving teachers and paraprofessionals; and the particular grant programs such as professional development for teachers and administrators, 21st Century Schools, and specific programs for homeless, migratory or limited English proficient students. However, there are a variety of smaller provisions that are of great significance of which you should be aware. What follows is a listing of some, but by no means all, of those provisions of NCLBA:

1. Release of Student Information to Military Recruiters and Institutions of Higher Education; Access to Students

Section 9528 of NCLBA creates an exception to the directory information requirements of FERPA (Family Educational Rights and Privacy Act). It requires each Local Education Agency (hereinafter "LEA" which, in this instance, means school districts), upon the request of a military recruiter or an institution of higher education to grant access to secondary school students' names, addresses and telephone numbers. However, the Act also requires that each LEA notify parents that they may request of the LEA that no student contact information be released to military recruiters or institutions of higher education without their consent.

Two other requirements are worthy of note. First, the law states that an LEA that grants access to its students by institutions of higher education or prospective employers (e.g. through job fairs or college placement interviews) must also grant the same access to military recruiters.

Second, the Secretary of Education, after consultation with the Secretary of Defense, is supposed to notify you of the above requirements within 120 days after the date of enactment of NCLBA (January 8, 2002).

At least two questions are raised by this section of law. The first is its effective date. Many of you have already heard from military recruiters who have stated, accurately, that this section of law is already in effect and school districts must comply with its terms. However, in order to comply with its terms, you need to give parents notice of their right to consent to the release of student contact information. Most of you would probably include that notice in the information parents review at the beginning of the school year. Given how little time is left in this school year, I encourage you to provide this notice as soon as possible to parents for the upcoming year so you can be organized at the beginning of September.

Second, the law is not specific about whether parents can, in response to the above notification, give detailed instructions to school officials on the subject of release of student contact information. For example, can a parent demand that no student contact information be released to military recruiters without consent, but may be released to any (or even to particular) institutions of higher education without consent? This could be very difficult for school staff to keep track of. It is my opinion that a school district could say to parents that the consent provisions are an all-or-nothing proposition. Either the parents may require their consent to the release of all student contact information to any person requesting such information or it will be released without their consent. Of course, nothing in NCLBA would prohibit a school from allowing the more tailored consent approach mentioned above.

2. School Prayer Certification

Section 9524 of NCLBA requires each LEA to certify in writing to the State Education Agency (in this case, the Vermont Department of Education) each year by October 1 that it maintains no policy that "prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary and secondary schools, as detailed in the guidance" provided by the Secretary of the U.S. Department of Education. The State Education Agency then must report to the U.S. Department of Education each year by November 1 those LEAs that have not filed the required certification by October 1 or who have been the subject of a complaint regarding interference with constitutionally protected prayer. The Secretary of Education is to issue guidance on this subject by September 1, 2002 and every second year thereafter. The guidance is to be reviewed by the Justice Department in advance to make sure the guidance "represents the current state of the law concerning constitutionally protected prayer in public elementary and secondary schools." Without having seen the guidance to be issued by the Secretary, it is hard to know exactly what will be included. However, generally speaking, constitutionally protected

prayer includes prayer initiated by an individual student or a group of students at a time and place and in a manner that does not disrupt classes or other school functions. Of course, it does not include any school prayer that might be initiated or sponsored by school officials. Such prayer would not be constitutionally protected. Indeed, it would be unconstitutional.

3. Provisions related to Parental Notification of, Consent for, or Opt-Out from Certain Student Surveys

Section 1061 of NCLBA makes important revisions to the Protection of Pupil Rights Act (also known as "PPRA," or the "Hatch Amendment"--20 U.S.C. §1232h). The current law does two things. First, it requires all "instructional materials, including teacher's manuals, films, tapes, or other supplementary material which will be used in connection with any survey, analysis, or evaluation as part of any applicable program" to be made available for inspection by parents. This part of PPRA is not changed by NCLBA. Second, it prohibits, as part of an applicable program, the administration of any survey, analysis or evaluation to a student regarding seven areas (political affiliations, mental and psychological problems, sex behavior and attitudes, illegal or anti-social behavior, critical appraisals of family members, privileged relationships such as doctors or lawyers, and, finally, income) without parental consent. Of somewhat less significance, the NCLBA amendments add to "political affiliations" the following words--"or beliefs of the student or the student's parent." Further, a new category has been added, namely that of "religious practices, affiliations, or beliefs of the student or the student's parent."

More significantly, the concept of "as part of an applicable program" has been greatly expanded. To date, PPRA's effects have been very limited as there are relatively few surveys, analyses, and evaluations administered "as part of an applicable program." That is because the phrase has been interpreted to mean that the survey, analysis or evaluation is actually funded with U.S. Department of Education funds. Under the new provisions of NCLBA, however, school districts must adopt policies, in conjunction with parents, on the rights of parents upon request to inspect any survey created by a third party (as I read it, "third party survey" means a survey funded by a non-U.S. Department of Education source). If the third-party survey does involve any of the above-mentioned eight categories, the parents may opt their children out of its administration. Annually, at the beginning of the school year, school districts must notify parents "directly" of these policies and must notify parents of the specific or approximate dates when such surveys might be administered. The school district's policies must also include provisions for protecting the privacy of students in connection with the administration of any such survey. Finally, the law suggests that these policy provisions do not apply to any "survey" (which includes an evaluation) administered in accordance with the Individuals with Disabilities Education Act (IDEA). However, the statutory reference is to the "administration of physical examinations or screenings." More clarification will be necessary on this latter point.

4. Provisions related to the Rights of Parents to Inspect Instructional Materials, to be Notified of, and Opt-Out from the Administration of Physical Examinations and the Collection, Disclosure and Use of Student Information for Marketing Purposes

The expansion of the PPRA provisions does not end with the new survey provisions mentioned above. Additionally, a school district's policies must, after consultation with parents, include provisions regarding: (1) the right of a parent upon request to inspect any instructional material used as part of the educational curriculum, (2) the administration of physical examinations or screenings [these terms do not include a "hearing, vision, or scoliosis screening"], (3) the collection, disclosure, or use of personal information collected from students for the purpose of marketing or selling the personal information, and (4) the right of a parent upon request to inspect any instrument used to collect the above-mentioned information.

As noted above in the case of surveys, the school district annually, at the beginning of each school year, must give "reasonable notice…directly" to parents of the adoption of such policies. Further, notice must also be given within a "reasonable time after any substantive change in such policies." The notice must also include the specific or approximate dates of, and offer the parents an opportunity to opt their children out of, the collection of personal information for the purposes of marketing and any "nonemergency, invasive physical examination or screening."

There is at least one odd exception to these provisions. The provisions regarding the development of policies regarding the collection, disclosure and use of personal information for marketing purposes do not apply to such activities if the purpose is to develop, evaluate or provide "educational products or services for, or to, students or educational institutions, such as the following:

(i) College or other postsecondary education recruitment, or military recruitment.
(ii) Book clubs, magazines, and programs providing access to low-cost literary products.
(iii) Curriculum and instructional materials used by elementary schools and secondary schools.
(iv) Tests and assessments used by elementary schools and secondary schools to provide cognitive, evaluative, diagnostic, clinical, aptitude, or achievement information about students (or to generate other statistically useful data for the purpose of securing such tests and assessments) and the subsequent analysis and public release of the aggregate data from such tests and assessments.
(v) The sale by students of products or services to raise funds for school-related or education-related activities.

(vi) Student recognition programs."

The law goes on to state that the entire section, including the above provisions regarding disclosure of personal information for marketing purposes, does not supersede the privacy protections of FERPA although that is hard to understand in light of the above-listed exceptions.

5. Parental Right-to-Know about Teacher Qualifications

Section 1111(h)(6) of NCLBA requires at the beginning of each school year that an LEA notify parents of their right to request information regarding the professional qualifications of their children's classroom teacher(s). In this case, the term "LEA" probably refers to a supervisory union or a school district but obviously it will be easier for a school district to carry out the provisions of the law. More specifically, the LEA must provide to parents, in a timely manner and in an understandable and uniform format and, to the extent practicable, in a language the parents can understand:

(i) Whether the teacher has met State qualification and licensing criteria for the grade levels and subject areas in which the teacher provides instruction.
(ii) Whether the teacher is teaching under emergency or other provisional status through which State qualification or licensing criteria have been waived.
(iii) The baccalaureate degree major of the teacher and any other graduate certification or degree held by the teacher, and the field of discipline of the certification or degree.
(iv) Whether the child is provided services by paraprofessionals and, if so, their qualifications.

In addition to the above, regardless of whether a parent requests the information, an LEA must provide the following:

(i) information on the level of achievement of the parents' child in each of the State academic assessments required by NCLBA; and
(ii) timely notice that the parent's child has been assigned to, or has been taught for four or more consecutive weeks by, a teacher who is "not highly qualified." The definition of "highly qualified" is contained in Section 9101(23) of NCLBA.

6. Boy Scouts of America Equal Access Act

Section 9525 of NCLBA, alternately entitled "Equal Access to Public School Facilities" and the "Boy Scouts of America Equal Access Act," provides that any school, LEA, or SEA that "has a designated open forum or a limited public forum and that receives funds made available through the [U.S. Department of Education]" may not "deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America, or any other…patriotic society [as defined in federal law] that wishes to conduct a meeting within that designated open forum or limited public forum." Under the law, a school creates a "limited public forum" whenever it "grants an offering to, or opportunity for, one or more outside youth or community groups to meet on school premises or in school facilities before or after the hours during which attendance at the school is compulsory." In other words, if you open up your school for outside groups to meet, you cannot withhold from the Boy Scouts or "patriotic" groups listed under federal law the same privileges.

7. Unsafe School Choice Option

You are all no doubt aware of the school choice provisions of NCLBA which serve as a consequence of Title I schools not making adequate yearly progress. While much is still to be learned and understood about these provisions, there is yet another provision of NCLBA, Section 9532, that requires some measure of school choice to certain students in certain schools. That section of law, ironically entitled "Unsafe School Choice Option," provides that the Vermont Department of Education must establish a statewide policy allowing students attending a "persistently dangerous school," or who become victims of violent crimes while on school premises, to attend a "safe" public elementary school or secondary school "within the local education agency" (emphasis added). We are working on the statewide definition of a "persistently dangerous school." How we ultimately define an "LEA," "persistently dangerous school," and "victim of a violent criminal offense" will determine whether this provision has much applicability here in Vermont.

The definition of LEA is important because if it means school districts, most Vermont school districts do not have more than one school in any particular grade level. If it means supervisory unions, there is likely more than one school in any particular grade level but state law does not now require interdistrict movement of students without payment of tuition, except as part of a high school choice region. And, with respect to high school choice regions, there are relatively few supervisory unions in which there is more than one high school.

The definition of "persistently dangerous school" is obviously significant. NCLBA's authors no doubt had in mind big city schools where criminal acts of violence reportedly are

more common. We will be consulting with you about how to define this term. The definition of a "victim of a violent criminal offense" is also significant. Does this refer to simple assault? Does the perpetrator have to be found guilty before it can be considered an "offense?" More clarity will need to be brought to this phrase.

8. Teacher Liability Protection

Vermont law currently provides protection for teachers against legal actions brought against them regarding conduct within the scope of their employment resulting in accidental injury to a person or damage to property. 16 V.S.A. §1756(a). See also 16 V.S.A. §834. Sections 2361 through 2368 of NCLBA provide that "no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if--

(1) the teacher was acting within the scope of the teacher's employment…
(2) the actions of the teacher were carried out in conformity with Federal, State, and local laws (including rules and regulations) in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school;
(3) …the teacher was properly licensed…or authorized by the appropriate authorities for the activities or practice involved…
(4) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher; and
(5) the harm was not caused by the teacher operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft or vessel to (A) possess an operator's license; or (B) maintain insurance."

These protections do not apply where the conduct complained of: constitutes a crime of violence or a sexual offense; results in a violation of State or Federal civil rights law; or involves the use of alcohol or drugs at the time of the misconduct. The law is not intended to preclude the school district itself from bringing a civil action against a teacher or to affect in any way a State's corporal punishment laws. And, of course, while these provisions may immunize a teacher from damages in a civil action, these provisions do not mean a teacher cannot be sued and suffer the burdens of being, at least for a time, a defendant in a civil suit.

This part of NCLBA went into effect 90 days after January 8, 2002 but its terms apply to the conduct of teachers that occurred both before and after January 8, 2002. From my reading of these provisions, it is very hard to see how it adds any new protections for teachers that do not already exist under Vermont law.

9. Transfer of Student Disciplinary Records

Prior law under FERPA permitted but did not require the transfer of student disciplinary records when a student transferred from one school to another. Indeed, FERPA permits but does not require the transfer of all of a student's education records, not just disciplinary records. Section 4155 of NCLBA expands upon FERPA by requiring Vermont to assure the U.S. Department of Education that, within 2 years after the date of NCLBA's enactment (January 8, 2002), it will have "a procedure in place to facilitate the transfer of disciplinary records, with respect to suspension or expulsion, by local education agencies to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full- or part-time basis, in the school." The intent here is to make sure that schools receiving students from other schools have full information about the disciplinary history of those students. We will be seeking your advice on the development of this procedure. The law is not altogether clear about whether it means that such a transfer is required in all cases of student transfer, or whether the procedure referred to is to be designed to simplify the transfer where schools voluntarily transfer student discipline records. We will seek further clarification from the U.S. Department of Education on this point.

I hope the above is helpful. I have also attached for your information an explanation of recent FERPA and PPRA changes from the Family Policy Compliance Office within the U.S. Department of Education as it covers a number of the same topics as the above. If you have any questions, please let me know.

WJR
Attachment
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